IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 401 OF 1987

Shashikant Purushottam Wagale ... Appellant

V/s

1. Shaikh Ibrahim Ahmed Rakhangi & ors. ... Respondents

Shri Suresh Gole for the appellant.

Shri Anil L. Desai for the respondents.

CORAM: P.V. KAKADE, J.

DATED: 14TH OCT., 2005

ORAL JUDGMENT:

1. The appellant has preferred this appeal against the judgment and order passed by the Addl. District Judge, Sawantwadi, dated 29.6.1987 dismissing the appeal whereby the appellant's appeal was dismissed and judgment and order passed by the Civil Judge, J.D., Sawantwadi, decreeing the suit for perpetual injunction came to be confirmed.

2. I have heard the learned counsel for both parties. Perused the record.

3. The facts giving rise to the dispute in nut-shell are thus -

The property bearing Survey No.65/4 and Survey No.64/7 bearing present suit Survey No.2794-A, property B bearing Survey No.64 Hissa No.13 CTS 2789 and 2790, property C bearing Survey No.64/12 are the suit lands within the Municipal limits of Sawantwadi. According to the plaintiffs, the suit lands and the buildings therein belong to him. Plaintiff No.1 resides in the building bearing Municipal Nos.187 and 188 which are old structures while property B belongs to plaintiff No.2 who is having his residential house in it being Municipal House No.189 where they reside with their family members. Property C originally belongs to one Bandekar, but it was purchased by defendant Wagale in the year 1975 and after the purchase, defendant No.1 constructed a Mangar (shed) in property C in the year 1976-77 with a Gadga around it. Property C is situated at Mathewada Kolgaon road which is south north in direction to the east. Property A is to the eastern side of property C and property B is to the northern side of property A. Property A and B are joined to the road by a way passing through property C of the

defendants. The disputed way is the way to the northern side of the Gadga (loose stond compound) constructed by defendants in property C and that way is having width of about 8 feet by which the plaintiffs used to approach Mathewada Kolgaon road from their house and plaintiffs were taking their vehicles by that way. The said way is locally called as Panand and it is the case of the plaintiffs that they have no other way to approach Mathewada Kolgaon road except the suit way and the plaintiffs and their predecessor-in-title enjoy the disputed Panand for more than 100 years and thus they have acquired a right of easement by prescription and as the suit way is the only way for the plaintiffs to approach Mathewada Kolgaon road the plaintiffs have acquired a right of easement of necessity also. The defendant was aware of the plaintiffs' right over the disputed way but still on 26.6.1982 the defendants dug out and constructed two wooden poles and obstructed plaintiffs' right of way. Similarly, defendant, on or about 30.6.1982 built up a thorney frame compound and obstructed plaintiffs' enjoyment of the way and hence the suit came to be filed for injunction against the defendant.

Defendant resisted the suit inter-alia denying the

allegations made by the plaintiffs and with submission that the map drawn by the plaintiffs and filed alongwith the suit is false and it suppressed material fact. It was denied that the plaintiffs have only way to approach the public road and that the plaintiffs were there taking their vehicles through defendant's property and that the plaintiffs enjoyed the suit way for more than 100 years and acquired right of prescription. It was further contended that the map drawn and filed by the plaintiffs did not reflect the proof of correct position of the suit property and, therefore, it should not be considered by the Court. It was the case of the defendant that the plaintiffs' family never used the said alleged way and the way shown in the map is not even a foot in width and it is falsely stated that it is 8 ft. in width. On such and other grounds, the suit was sought to be dismissed with costs.

4. The learned Trial Judge adjudicated the dispute on merits on the basis of available evidence and came to the conclusion that the plaintiffs had proved that they enjoyed the suit way which was 8 ft. in width passing through defendant's property for mroe than statutory period of 20 years and, therefore, they have acquired a right of easement and, therefore, they had acquired a

right of easement by prescription. However, it was held that the plaintiffs failed to prove easement of necessity. It was further held that the plaintiffs had proved the alleged obstruction made by the defendant and, therefore, the suit for injunction came to be decreed.

The appeal was carried to the District Court at Sawantwadi. The learned Addl. District Judge, after hearing both parties came to the conclusion that the findings recorded by the learned Trial Judge were legal and proper and, therefore, it would brook no interference and, as such, the appeal came to be dismissed. Hence the present appeal.

5. At the stage of admission, this Court, while admitting the appeal, framed one substantial question of law to the effect that, whether the evidence led by the plaintiffs was sufficient to show acquisition of easement by prescription ?

6. At the outset, it may be noted that the entire evidence on record definitely shows that the issue involved in the dispute is purely a question of fact and cannot be held to be the question of law, leave aside

the substantial question of law and, therefore, technically it would be clearly out of the ambit of Sec.100 of Code of Civil Procedure. However, since the appeal is admitted, it is necessary for us to look into the evidence in order to see whether the concurrent findings recorded by both the Courts below are legal and proper.

7. The claim of the plaintiffs is that there is a Panand (way) of 8 ft. in width starting from the above referred public road going through the defendant's property C for going towards plaintiffs' properties A and B and that way has been used by the plaintiffs from the time immemoral as an easement for more than 100 years and thus they have acquired right of prescriptive easement and the plaintiffs have no other right of way except the suit way and hence it cannot be obstructed by the defendant. In order to establish the said claim, the plaintiffs did produce voluminious documentary evidence on record. Besides the documentary evidence, the plaintiffs' witnesses have testified to that effect which would be sufficient to establish the entire position. The evidence on record shows that there are electric poles of about 5 in number with electric lights, out of which 3 poles are maintained by the

Municipality and those poles have been installed for more than 19 years prior to the suit. The defendant has purchased the property C by sale deeds dated 25.7.1975 and 7.4.1975 from Vitthal Bandekar vide Exhs. 147 and 148. The plaintiffs have produced the electric bills at Exhs. 214 to 220 for the period from December, 1976 to March, 1978 and the electric estimate for the house bearing No.188 also has come on record. The said correspondence also shows that the address given therein is of Kazi Dindi Mathewada and the letters are on the address of plaintiffs' as house No.187 and 188-B Ward which house belongs to Rakhangi and house No.189 belongs to plaintiff No.2. Letters are for the period from 25.5.1957 to 30.6.1973. Similarly, two other important letters are produced at Exhs. 238 and 239 dated 2.1.1975 and 19.2.1969. Similarly, the identity cards of the ration shop at the address of house No.187, 188-B Ward is in the name of plaintiff No.1 dated 4.1.1958 and 10.7.1964. Plaintiffs have also produced receipt of payment of municipal tax at Exh.240 for the period from 1962-63 to 1979-80 regarding municipal tax of House No.189 belonging to plaintiff No.2. The assessment receipts are also for the period from 9.7.1955 to 7.7.1977. Therefore, all this evidence, especially the existence of electric poles for more than 19 years would

definitely show that the way is used by the plaintiffs for the statutory period of 20 years or more as contemplated under Sec.15 of the Easements Act.

8. The learned counsel for the appellant vehemently urged that, in order to establish the right of prescription which was necessary for the plaintiffs to establish the use of the way for statutory period of 20 years and not a day less as is prescribed by Sec. 15 of the Easements Act. However, it is to be noted that the existence of poles is established to be for more than 19 years and, therefore, it can safely be presumed that it is there from 20 years or more especially when the documents on record show that plaintiffs are residing in the property at least since the year 1952 as well as 1957 and, therefore, the principles of preponderance of probabilities would definitely tilt in favour of plaintiffs in order to hold that the way is used for more than 20 years prior to the suit.

The learned counsel for the appellant sought to raise various other aspects regarding the evidence on record including the plaintiffs alternative case of right of necessity over the way. However, it was discarded by the Trial Court and, therefore, we need not take that

aspect into consideration and at any rate we cannot go beyond substantial question of law raised by this Court at the time of admission of the appeal.

9. In this regard, it must be noted that, in the case of **Christopher Barla v/s Basudeo Naik, reported in 2005 (1) Supreme 745,** the Apex Court has laid down that where finding of fact recorded by the first appellate Court was a pure finding of fact based on record, High Court shall be justified in not interfering such finding in second appeal. Similarly, in the case of **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar & ors., reported in A.I.R. 1999 SC 2213,** the Apex Court has held that the concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of powers under Sec.100 of the Code of Civil Procedure. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last Court of fact, being the first appellate Court. In a case wherefrom a given set of circumstances, two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found

that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncement made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.

In the present case before us, I have perused the entire evidence critically and must note that the lower appellate court has appreciated the factual aspects of the evidence in proper perspective and, therefore, it need not be interfered with.

10. In the result, I find no merits in the appeal and, therefore, stands dismissed with no order as to costs.

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